

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: November 19, 2007)

DO NOT PUBLISH

PHILLIP WAY,	)	
as parent of his daughter,	)	
BAILEY WAY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 05-0588V
	)	Attorneys' Fees; Attorneys' Costs;
SECRETARY OF	)	
HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
	)	

DECISION ON ATTORNEYS' FEES AND ATTORNEYS' COSTS<sup>1</sup>

On February 21, 2007, the United States Court of Federal Claims entered judgment dismissing the petition in this case. *See Way v. Secretary of HHS*, No. 05-0588V, Judgment (Fed. Cl. Feb. 21, 2007). Petitioner, Phillip Way (Mr. Way), as parent of his daughter, Bailey Way (Bailey), did not pursue an appeal to the United States Court of Appeals for the Federal Circuit. On May 10, 2007, the special master directed Mr. Way to file by no later than June 29, 2007, a request for reasonable attorneys' fees, attorneys' costs and personal expenses as defined by General Order No. 9. *See Way v. Secretary of HHS*, No. 05-0588V, Order of the Special Master (Fed. Cl. Spec. Mstr. May 10, 2007). The special master instructed the clerk of court to provide a courtesy copy of the special master's May 10, 2007 order to Mr. Way's then-former attorney of record, Ronald C.

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<sup>1</sup> As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

Homer, Esq. (Mr. Homer).<sup>2</sup> *See Way v. Secretary of HHS*, No. 05-0588V, Order of the Special Master (Fed. Cl. Spec. Mstr. May 10, 2007). Although Mr. Way did not respond to the special master's May 10, 2007 order, Mr. Homer submitted an application for \$17,887.79 in attorneys' fees and attorneys' costs. *See Petitioner's Former Counsel's Application for Fees and Costs (Fee Petition)*, filed July 9, 2007.

Because Mr. Way did not receive Program compensation, the statute enacting the Program accords discretion to the special master to "award an amount of compensation to cover" Mr. Way's "reasonable attorneys' fees and other costs" as long as "the special master or court determines that" Mr. Way possessed "a reasonable basis for the claim" and that Mr. Way filed the petition "in good faith." § 300aa-15(e)(1); *see, e.g., Di Roma v. Secretary of HHS*, 1993 WL 496981 (Fed. Cl. Spec. Mstr. Nov. 18, 1993). As the United States Supreme Court has cautioned in cases involving other fee-shifting schemes, the special master's "discretion is not without limit." *Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989). Thus, absent "special circumstances," the special master "should ordinarily" award attorneys' fees and costs to an unsuccessful petitioner. *Id.*, citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

The special master reviewed thoroughly the Fee Petition. On August 8, 2007, he enlarged *sua sponte* respondent's time within which to respond to the Fee Petition. *See Way v. Secretary of HHS*, No. 05-0588V, Order of the Special Master (Fed. Cl. Spec. Mstr. Aug. 8, 2007). He directed respondent to address specific issues. *See Way v. Secretary of HHS*, No. 05-0588V, Order of the Special Master (Fed. Cl. Spec. Mstr. Aug. 8, 2007).

Respondent filed a response to the Fee Petition on August 22, 2007. *See Respondent's Opposition to Petitioner's Application for Attorneys' Fees and Costs (Response)*, filed August 22, 2007. On October 26, 2007, the special master convened an informal, yet substantive, status conference to review the Fee Petition and the Response. Based upon Mr. Way's representations during the conference, and based upon his experience, the special master expressed full satisfaction regarding the issues that the special master identified in his August 8, 2007 order. *See Way v. Secretary of HHS*, Order of the Special Master (Fed. Cl. Spec. Mstr. Oct. 26, 2007). The special master concluded that Mr. Way is entitled to an award of attorneys' fees and attorneys' costs. *See Way v. Secretary of HHS*, Order of the Special Master (Fed. Cl. Spec. Mstr. Oct. 26, 2007). However, the special master recognized that Mr. Way had incurred additional attorneys' fees and attorneys' costs occasioned by the special master's August 8, 2007 order. *See Way v. Secretary of*

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<sup>2</sup> Mr. Way filed his Program petition on May 31, 2005. *See Petition (Pet.)*. He appeared *pro se*. *See Pet.* Mr. Homer moved to substitute his appearance on June 9, 2005. *See Motion for Substitution of Pro Se Petitioner (Motion to Substitute)*, filed June 9, 2005. Mr. Homer moved to withdraw his appearance on June 16, 2006. *See Motion to Withdraw as Attorney of Record (Motion to Withdraw)*, filed June 16, 2006. The special master granted Mr. Homer's Motion to Withdraw on June 20, 2006. *See Way v. Secretary of HHS*, No. 05-0588V, Order of the Special Master (Fed. Cl. Spec. Mstr. June 20, 2006). Mr. Homer moved again to substitute his appearance on September 11, 2007.

*HHS*, Order of the Special Master (Fed. Cl. Spec. Mstr. Oct. 26, 2007). The special master directed the parties to discuss informally the calculation of an appropriate award for attorneys' fees, attorneys' costs and personal expenses as defined by General Order No. 9. *See Way v. Secretary of HHS*, Order of the Special Master (Fed. Cl. Spec. Mstr. Oct. 26, 2007).

On November 15, 2007, the parties filed a joint status report. The parties represent that respondent does not object to an award of \$21,700.00 in attorneys' fees and attorneys' costs. The special master has considered again the record as a whole. The special master finds that \$21,700.00 in attorneys' fees and attorneys' costs is reasonable.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment in Mr. Way's favor for \$21,700.00 in attorneys' fees and attorneys' costs. The judgment shall provide that Mr. Homer may collect \$21,700.00 from Mr. Way. Under Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

The clerk of court shall send Mr. Way's copy of this decision to Mr. Way by overnight express delivery.

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John F. Edwards  
Special Master